HOGAN & HARTSON
L.L.P.

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910

LINDA L. OLIVER
PARTNER
DIRECT DIAL (202) 637-6527

August 15, 1996

BY HAND DELIVERY

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area (CC Docket No. 96-149)

Dear Mr. Caton:

Enclosed for filing in the above referenced docket are the original and eleven copies of the Comments of LDDS WorldCom. In addition, a diskette in WordPerfect 5.1 format has been submitted to Janice Myles, Common Carrier Bureau.

Please return a date-stamped copy of the enclosed (copy provided).

Respectfully submitted,

Linda L Oliver

Linda L. Oliver
Counsel for LDDS WorldCom

Enclosures

cc: Janice Myles, Common Carrier Bureau
ITS

No. of Copies rec'd 0 + 11
List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	CC Docket No. 96-149

COMMENTS OF LDDS WORLDCOM

Of Counsel

Catherine R. Sloan
Richard L. Fruchterman
Richard S. Whitt

WORLDCOM, INC.
d/b/a LDDS WorldCom
Suite 400
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Peter A. Rohrbach
Linda L. Oliver
Kyle D. Dixon
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Its Attorneys

August 15, 1996

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

SUMMARY

Full implementation of Section 272 of the Act is one of the Commission's most important tasks. The Act sets the stage for a new world in which dependence on RBOC networks will increase, as will RBOC incentives to engage in discrimination. RBOC rivals will rely on the local telephone network not just for exchange access, but also for the inputs they need to provide local service. RBOCs will have new incentives to discriminate in the access market (as they prepare to and begin to provide interLATA services). And they will have new incentives to exploit the local network to defend their heretofore de jure local service monopoly.

Structural separation is the central protection established by the Act to deal with these discrimination dangers. It is less resource intensive, and far less regulatory, than alternative means. The Commission must ensure in this docket that Section 272 is implemented to prevent RBOC discrimination with respect to either exchange access, or interconnection provided under Sections 251 and 252. In the full-service, one stop shopping market that is emerging, discrimination in either area would contaminate competition across a broad range of retail services.

The Act sets forth a number of criteria and requirements to govern separation of the RBOC affiliate from the operating company. However, for these safeguards to have any meaning, the Commission must ensure that the RBOC does not subvert them in its marketing practices. In particular, the Commission should enforce the Act by making the interLATA affiliate the basic retail entity for one stop package offerings of local and long distance service. The affiliate may offer interLATA service in competition with other companies, buying exchange access from the operating company. The separated affiliate also can offer local services by

purchasing local service elements and wholesale services from the telco. And the affiliate can offer both local and long distance together, in competition with other carriers who will be obtaining their own local network inputs on a nondiscriminatory basis.

This structure fosters the Act's mandate for full separation of interLATA services while permitting full-service retail competition to proceed. However, for the Act's structure to work, the Commission must also construe narrowly and enforce the clear limits of the Act's residual authority for the RBOC operating company to market services offered by the interLATA affiliate. Specifically, any such sales activity must be limited to "side-by-side" retailing of local and interLATA services, without bundling of BOC local services with the separately tariffed interLATA services of the affiliate. In the same vein, the Commission also should prohibit the RBOCs from moving any local network operations whatsoever into the separate subsidiary. There can be no exceptions to this rule.

The Commission also must apply dominant carrier regulation to the RBOCs' interLATA affiliates, particularly during the initial period of in-region interLATA activity when the adequacy of separation and other safeguards has not been fully tested. The RBOCs will continue to control bottleneck inputs required by competitors for both exchange access and now local service. The Commission has previously found that such "essential facility" bottlenecks constitute prima facie evidence of market power. The Commission should also monitor relative earnings of the operating company and the interLATA affiliate. This action is needed to identify situations in which the RBOC evades nondiscrimination requirements by

pricing all bottleneck operating company inputs at above cost levels, thereby shifting cost centers within the company for its own competitive advantage.

Enforcement procedures are as important as the structural safeguards themselves. Once the RBOCs are authorized to provide interLATA services in their regions, their only incentive to continue to comply fully with the safeguards will come from the penalties that would flow from violations. As the Commission designs its enforcement provisions to accompany separation, it should recognize that in the ordinary case the information needed to establish compliance will rest with the RBOC. The Commission therefore is correct in proposing to assign RBOCs the ultimate burden of proof. The competition envisioned by the Act will succeed only if sufficient separation is created -- and then enforced.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	CC Docket No. 96-149

COMMENTS OF LDDS WORLDCOM

WorldCom, Inc., d/b/a LDDS WorldCom ("LDDS WorldCom") hereby submits its comments in response to the Notice of Proposed Rulemaking, FCC 96-308, released on July 18 in the captioned proceeding ("Notice").

INTRODUCTION

The FCC's full implementation of Section 272 of the Telecommunications Act of 1996 ("the Act") is essential if competition is to thrive and consumers are to reap the Act's full promise. Structural and nonstructural safeguards are critical to prevent the RBOCs from discriminating against their competitors, and to enable this Commission, the state commissions, and the RBOCs' competitors to detect anticompetitive activity when it occurs. Even after the Act's Section 251 and 252 provisions are fully implemented -- a prerequisite for RBOC

interLATA entry -- the RBOCs will retain the ability to backslide on those provisions, and to discriminate against competitors in countless ways. 1/

As a preliminary matter, we note that in these comments we refer generally to an RBOC without regard to its corporate structure or that of its affiliates. The company as a whole, as well as the telephone operating company and any other subsidiaries, all have the same incentives to discriminate and engage in anticompetitive activity. The purpose of Section 272, and of this implementing proceeding, is to determine how best to structure the RBOCs' activities so as to minimize the likelihood that such discrimination and anticompetitive activity will occur, and maximize chances for it to be detected when it does.

When later in the comments we discuss the specific requirements of Section 272 as they apply to the various affiliates and subsidiaries of the RBOC, we will refer to the local exchange network company as the "BOC" (consistent with the statutory language), or as the "telephone operating company," the "operating company," or the "local exchange network company." We refer to the interLATA affiliate required by Section 272 as the RBOC's or BOC's "interLATA subsidiary" or "272 affiliate."

Finally, we emphasize that our focus here is on structural separation for in-region RBOC services. RBOCs already have established separate subsidiaries for their out-of-region interexchange services or other activities, but

---

1/ The FCC's recent decision adopting regulations to implement Sections 251 and 252 is a critical first step on the road to developing local competition -- and thus full-service competition. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325, released August 8, 1996 ("Interconnection Order").

those subsidiaries do not meet the special requirements of Section 272. Thus, for example, affiliated out-of-region and operating company personnel are sharing information and interacting freely. Some RBOCs may choose to fold their out-of-region activities into their 272 affiliate, in which case such communications and other activities would cease. But in any event, as the Commission adopts rules here, it should make clear that the 272 affiliate will be fully separated -- not just from the operating company -- but from all other RBOC entities that do not meet the Section 272 requirements.

I. THE FCC MUST BASE ITS ANALYSIS ON THE REALITIES OF A POST-RBOC ENTRY WORLD.

Notice [All Sections].

To begin with, we have identified four key principles, drawn from market realities, that should guide the Commission in its analysis of the structural separation and nondiscrimination provisions of Section 272. These realities are the backdrop for the development of rules in this and other safeguard dockets. The principles are discussed at length throughout these comments, but we summarize them here:

Principle One: Dependence on RBOC networks is increasing. In the post-Act world, the RBOCs' competitors are now also dependent upon the RBOC for inputs necessary to provide local exchange service, in addition to conventional exchange access.

Principle Two: Discrimination in *either* exchange access *or* local service inputs can prevent competition in *all* telecom services. The FCC must design its safeguards for a one-stop-shopping, full-service-package world, not for the pre-Act world in which the interLATA and intraLATA/local telephone markets were artificially segregated. In the future, widespread RBOC

discrimination in any particular area will have consequences across the entire retail market.

Principle Three: New networks will not reduce RBOC market power soon. The construction of new local exchange facilities will take time, will not occur in some locations, and will not necessarily result in competitive choice for non-network companies.

Principle Four: It is premature to deregulate RBOC pricing. The regulatory safeguards that now will replace the MFJ are not tested. Yet RBOC incentives to discriminate (to defend their local markets and to expand their toll market share) are increasing.

These principles lead to the conclusion that strong structural and nondiscrimination safeguards must be put in place in order to protect consumers from cross-subsidization and supracompetitive pricing. They also are necessary to prevent discrimination in the pricing and provisioning of inputs required by RBOC competitors. Dominant carrier status is essential for the RBOC's interLATA activities, especially if the RBOCs are to be permitted to create bundled service offerings combining local and interLATA services. This is particularly true initially, before the sufficiency of structural separation and other safeguards are tested.

II. COMPETITORS ARE DEPENDENT UPON THE RBOC FOR LOCAL SERVICE INPUTS AS WELL AS EXCHANGE ACCESS.

A. The New Full Service World

Notice [All Sections].

FCC (and antitrust) policies in the past have been premised on the dangers that arise from the incumbent LECs' control over interexchange access. Indeed, this problem was so serious that it required the divestiture of AT&T. The "local exchange bottleneck" has persisted long after multiple nationwide long

distance networks have been constructed and vigorous competition has developed for both retail and wholesale long distance service. 2/

The continued existence of a monopoly in the local exchange often was cited as the justification for a continuation of the ban on RBOC provision of interLATA service. The RBOCs clearly had (and still have) a near complete monopoly on the provision of exchange access to interexchange carriers within their regions. Until recently, however, this monopoly was considered natural except at the margins, such as through competitive provision of interoffice local transport by "competitive access providers" or "CAPs."

This thinking began to evolve several years ago, as carriers began to contemplate the possibility of providing not just competing local exchange access services, but also competing local exchange service to end users. The recognition grew, moreover, that when a carrier provides local exchange service to an end user, it necessarily also provides exchange access to that end user. The same subscriber loop and end office facilities are used for both functions. 3/ It also became apparent, however, that the cost of duplicating the existing local exchange networks would be prohibitive, at least in the short run. For smaller carriers or those with a broad

---

2/ By wholesale, we mean here the ability of carriers to purchase transmission and switching capacity from a number of long distance network providers on a carrier-to-carrier basis. The purchasing carriers in turn typically provide services to end users, taking advantage of the carrier-to-carrier pricing of the underlying network facilities acquired on a "wholesale" basis. The RBOCs already are using such offerings to provide "incidental" and out-of-region interLATA services.

3/ See Interconnection Order at paras. 357-58, 363.

geographic service area, moreover, that cost might be prohibitive for a much longer period. 4/

Thus, the 1996 Act recognizes that in order for new entrants to provide competing local exchange and exchange access service, new local service providers will have to employ the existing incumbent local exchange network facilities -- in piece parts or in combination -- in order to provide competing local exchange service. Section 251(c)(3) of the Act requires incumbent LECs to make their networks available to competitors on an unbundled basis, at cost, and to permit competitors to combine those elements and to provide all services over those elements, including interexchange access. 5/ The Act also requires, in Section 251(c)(4), that incumbent LECs make available to requesting carriers all their retail offerings at wholesale rates. 47 U.S.C. § 251(c)(4), 252(d)(3) (1996).

It is now well-accepted that in the near future traditional long distance providers and other carriers must be in a position to create competing full-service offerings themselves. Competitors must therefore be able to employ the local exchange network to create local services, or at a minimum to use service resale to add local exchange service to their existing product packages.

This imperative expands the dependency of carriers on the RBOC network, and must inform the Commission's decisions here. In designing the

---

4/ See Interconnection Order at para 14. ("Although they may provide some of their own facilities, [many] new entrants will be unable to reach all of their customers without depending on the incumbent's facilities".)

5/ 47 U.S.C. § 251(c)(3), 252(d)(1) (1996). See Interconnection Order at paras. 344, 356-57.

structural and nondiscrimination safeguards mandated by Congress, the Commission must keep in mind that the RBOCs' competitors are now even more dependent on the RBOCs than in the past. They will rely on the RBOCs not just for exchange access to originate and terminate long distance calls, but also for the ability to provide competing end user offerings that include local exchange services.

B. Discrimination And Anticompetitive Conduct Will Increase, Yet Be Difficult To Detect And Prevent, In A Full Service World.

Notice, paras. 55-162 [Sections IV, V, VI, VII, VIII].

At the same time, the Act increases the incentives of the RBOCs to discriminate. Under the MFJ-defined market structure, RBOCs had relatively less reason to discriminate against interLATA carriers because the RBOCs did not participate in that market. Meanwhile, the RBOCs' local markets generally were protected as de jure monopolies. As limited opportunities for local network competition arose, however, the RBOCs responded rapidly with discrimination in the area of expanded interconnection, and increased cross-subsidization of services facing nascent competition.

In the Notice, the FCC recognized that the Act changes the market -- and with it RBOCs' incentives and ability to discriminate with respect to interLATA access. The Commission observed that:

> [B]ecause the BOCs are likely to offer local exchange and interLATA services as integrated offerings to end users, they may have a greater incentive and ability to use their control over local bottlenecks to obtain anticompetitive advantages over their interLATA rivals. Indeed, to the extent that both the BOCs and their competitors offer local and long distance services as a unified package, BOC practices that reduce the attractiveness of their

> competitors' long distance offerings would make the package of services as a whole less attractive. 6/

The Commission also correctly recognized that:

> [T]o the extent carriers offer both local and interLATA services as a bundled offering, if a BOC were to discriminate, it could entrench its position in local markets by making its rivals' offerings less attractive alternatives for local and access services. 7/

However, the Notice does not appear to fully recognize the increased dependency of competing carriers on the RBOC network. Competitors will look to RBOCs not only for exchange access -- which affects the "attractiveness" of the interexchange offerings of competitors -- but also for interconnection and wholesale services -- which will affect the "attractiveness" of the competitor's local offerings. Yet discrimination in either area clearly would damage competition in the developing market for "unified packages" recognized by the Commission.

Indeed, we would submit that the danger that RBOCs will interfere with their competitors' ability to provide high quality, competitively priced local exchange service is even greater than their ability to discriminate in the provision and pricing of exchange access services. This is so because of the complexity of the local network when used for the purposes set out in Section 251 of the Act, and the lack of any real world experience in this area.

The FCC has spent many years regulating the pricing and provisioning of exchange access (and enforcing related "equal access" rules) -- albeit

---

6/ Notice at para. 147.

7/ Notice at para. 8.

at a time when the RBOCs had far less incentive to discriminate against IXCs because of the MFJ interLATA restriction. Obviously, the FCC still has more work to do in its access reform and universal service dockets, as do the state commissions. And certainly, with interLATA entry now a possibility, the RBOCs' incentives to discriminate in the provision of exchange access to competitors will be far greater than before.

But the task of preventing, policing, and detecting discrimination in exchange access pales in comparison to the task of ensuring that local interconnection is provided in a nondiscriminatory manner. The Section 251/252 implementation process has only just begun. The FCC's initial order is over 700 pages long, and relies upon state commissions to complete difficult implementation work. 8/ The complexity and untested nature of employing unbundled network elements and resale to provide competing local exchange service means that there is an enormous opportunity for the RBOC to discriminate in the provisioning and pricing of these necessary inputs.

Not only will the RBOCs be in a position to engage in anticompetitive discrimination in the provision of necessary inputs for local exchange service competitors, their full mix of service offerings will make it difficult to detect and prevent such discriminatory and anticompetitive activity.

The term "full-service package" understates the significance of the change in the market for telecommunications services that is likely to come about following interLATA entry by the RBOCs. The distinction between interLATA and

---

8/ Interconnection Order at paras 2, 133-38.

intraLATA/local, and between toll and local exchange, are entirely artificial. The first is a legacy of the antitrust consent decree breaking up the old AT&T; the second is a legacy of regulatory decisions about the proper scope of flat-rate calling areas (the definition of local exchange service). But the Act breaks down these artificial lines by allowing all carriers to provide any service. Telephone service will be sold as telephone service -- and priced in a way that is attractive to consumers. It will be in the interest of the RBOCs, moreover, to disguise the former distinctions between toll and local exchange, because that will make it more difficult to compete against them. 9/

Consumers also would likely welcome the chance to buy telephone service in new ways -- for example, to pay a flat rate for calling throughout a state. In the CMRS market, where such artificial lines never existed for non-wireline licensees, carriers priced services without regard to local exchange or LATA boundaries.

Of course, the point here is not that there is problem per se with the elimination of regulatory lines between telephone markets. Rather, this discussion highlights one of the competitive implications of this major change -- and

---

9/ State regulators may well require RBOCs to continue to provide a separate local exchange service product, and certainly RBOC competitors will need such products to exist in order to be able to resell local exchange service pursuant to Section 251(c)(4) of the Act. But there is no reason why an RBOC would not seek also to create telephone offerings that eliminate the line between local and toll. Indeed, the creation of innovative service packages was one of the benefits that Congress believed might flow from a decision to erase the legal boundaries between the local and long distance markets. See Notice at para. 6.

underscores the import of this change for the Commission's decisionmaking in this docket.

Finally, LDDS WorldCom agrees with the Commission that consistent national rules are necessary with respect to Section 272 structural separation. This conclusion rests on the framework of the Act itself. In order to enforce Section 271 consistently across states and among RBOCs, the same rules must be enforced at the time of RBOC entry and apply thereafter. More generally, the Act moves away from distinctions between interstate and intrastate services. Just as an RBOC affiliate may provide any interLATA service (intrastate or interstate), so that affiliate must be subject to consistent national rules.

III. "ONE STOP" OFFERINGS OF LOCAL AND LONG DISTANCE SERVICES MUST BE PROVIDED THROUGH THE RBOC'S INTERLATA AFFILIATE.

A. The Act Makes The InterLATA Affiliate The Basic Retail Entity For One Stop Shopping.

Notice, paras. 55-64, 90-92, para. 107 [Sections IV, VII, VIII].

As discussed in the previous Section, so long as the RBOCs' competitors are dependent upon the RBOC for any of the necessary inputs to the full-service package, there is the substantial risk that the RBOC will engage in discrimination and anticompetitive activity in order to favor its own offerings. That discrimination and anticompetitive activity cannot be detected -- or prevented -- if the local network company and the retail company providing the packages of services are one and the same. As we discuss in detail in this section, the Act's solution to this problem is to permit full service retail offerings to be provided, if at all, only by the interLATA affiliate.

Of course, the Commission also must strictly interpret the separation and nondiscrimination provisions of Section 272(b) and 272(c) so as to maximize the effectiveness of these safeguards. 10/ We strongly support the FCC's tentative conclusions in this regard, 11/ which are mandated by the plain meaning of the Act. But no matter how strong the specific separation and nondiscrimination rules are, their effectiveness will in large measure be defeated if the RBOC is allowed to offer combined packages of local and interLATA services through the efforts of the local exchange network company and interLATA affiliate working together.

It therefore is essential, and mandated by the Act, that the RBOCs provide blended, discounted, or bundled offerings of local and interLATA services, if at all: (1) only through the interLATA affiliate, (2) with the interLATA affiliate obtaining the local exchange components on the same basis as its competitors (through purchase of unbundled elements, construction of new facilities, or service resale).

The plain language of the Act requires this structure. Section 272(b)(1) requires the separate affiliate to "operate independently from the Bell

---

10/ Although we do not address the treatment of information services at length in these comments, the same considerations warrant strong structural safeguards for RBOC provision of such services. In particular, we support the FCC's tentative conclusion that RBOCs "must provide information services through a separate affiliate, regardless of whether these services are provided in region or out-of-region." Notice at para. 41. The Act's provisions also supersede the FCC's Computer III rules and thus void CEI plans that fail to comply with the Act. Notice at para. 49. See Comments of LDDS WorldCom in Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Enhanced Internet Access Services, CCBPOI 96-09 (filed August 9, 1996).

11/ Notice at paras 55-89.

Operating Company." 12/ Section 272(b)(3) requires the operating company and the affiliate to "have separate officers, directors, and employees." Section 272(b)(5) requires the affiliate to "conduct all transactions with the Bell Operating Company on an arm's length basis with any such transactions reduced to writing and available for public inspection." Section 272(c)(1) prohibits a Bell Operating Company from discriminating in favor of itself or its affiliate "in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards." 13/ Section 272(e) generally requires the Bell Operating Company to fulfill requests in a manner that does not favor itself or its own affiliate.

These provisions compel the conclusion that Congress intended the RBOC's interLATA affiliate to operate entirely independently of the telephone exchange company. This goal would be completely undermined, however, if the telephone operating company and the interLATA affiliate were permitted to combine their efforts to create full-service offerings of local exchange and long distance service. We are not suggesting that a consumer could not purchase local exchange service from the BOC, and purchase interLATA service separately from the affiliate. The Act does not remove the BOC from the retail business. But this side-by-side provision of service permits no transactions to take place between the affiliates, no coordination, and no joint pricing decision.

12/ We agree with the FCC's tentative conclusion that this subsection imposes requirements that go beyond subsections 272(b)(2)-(5). Notice at para. 57.

13/ This language plainly extends far beyond the nondiscrimination requirements of Section 202(a) of the Act, 47 U.S.C. § 202(a). See Notice at para. 72. As discussed above, this entails at a minimum no joint ownership of facilities or property, no sharing of CPNI employees or other assets or administrative functions, and similar separation.

There is no other practical way to ensure that each of the protections in Section 272 are effective. Permitting bundling by the operating company jointly with its affiliate would, by definition, violate those provisions. It would be impossible, as a practical matter, for the two affiliates to have an "independent," "arm's length" relationship if they are working together to create attractive offerings blending local and long distance services. 14/ Discrimination cannot be prevented if the affiliate may engage in joint offering with the operating company without obtaining local service on the same basis as its competitors. 15/ Crafting packaged offerings also requires the use of "joint employees" -- or at least requires employees of one affiliate to help the other affiliate sell products. 16/ The other separation provisions of Section 272 also would mean little in the face of bundling by a BOC and its affiliate. 17/

The Act's strictures are not onerous. They permit the RBOCs' interLATA affiliate to provide any retail service package it wishes. The separate affiliate simply cannot take advantage of its special status as an RBOC affiliate, but must instead obtain the local exchange piece of its offering the same way every other carrier must. This is the essence of nondiscrimination. As the FCC tentatively concluded in the Notice:

> the prohibition against discrimination in Section 272(c)(1) means, at minimum, that BOCs must treat all other entities in the same manner as they treat their affiliates,

---

14/ See 47 U.S.C. § 272(b)(1), (b)(5) (1996)

15/ See 47 U.S.C. § 272(c)(1) (1996).

16/ See 47 U.S.C. § 272(b)(3) (1996).

17/ See 47 U.S.C. § 272(b)(5), 272(e) (1996).

> and must provide and procure goods, services, facilities and information to and from these other entities under the same terms, conditions, and rates. 18/

This approach also is least regulatory way to ensure that Sections 251 and 252 will be implemented in the way that Congress envisioned. If the RBOC's own affiliate is required to obtain local exchange service in the same fashion as its competitors, then it is much more likely that the RBOC's operating company will provide local exchange service on a nondiscriminatory basis, at nondiscriminatory prices, and with adequate operational support. Congress correctly understood that such structural measures were the least intrusive, least resource-intensive and most effective way to ensure the success of its procompetitive measures.

B. Congress Did Not Intend That RBOCs Could Negate The Separation Provisions Through Operating Company-Level Packaging Of Local And InterLATA Services.

Notice at paras. 90-92 [Section VI].

The Commission asks for comment on the meaning of the joint marketing provisions of Section 272(g) and Section 271(e) of the Act. 19/ Section 272(g)(2) is cast in the negative as a prohibition on certain RBOC activity. Specifically, this provision was intended simply to prevent the RBOCs from advertising and otherwise promoting their interLATA offerings, and from contracting to provide such services, before the RBOCs actually were granted authority to provide interLATA services. The provision ensures that the operating company would not be able to create a self-fulfilling prophecy through premature

---

18/ Notice at para. 73.

19/ Notice at paras. 90-92.

advertising and marketing activities, or be allowed to sew up business through contractual or other arrangements before they and their larger IXC competitors were authorized to provide these services.

Section 272(g) itself says nothing, however, about how the telephone company and its interLATA affiliate are permitted to act after interLATA relief has been granted, or about how their relationships must be governed. Section 272(g) must be read to be consistent with the fundamental requirement of Section 272(a)(1) that in-region interLATA services be provided only through an affiliate separate from the local telephone operating company, as well as with the specific separation provisions of Sections 272(b) and 272(e). 20/

The FCC in its Notice suggests tension between Section 271(g)(2) and the separation provisions of Sections 272(b)(3) and (b)(5), which respectively require the BOC and its affiliate to "have separate officers, directors, and employees," and require all transactions to be conducted between the BOC and its affiliate "on an arm's-length basis." 21/ It is true that Section 271(g)(2) could be read implicitly to permit the RBOC's local exchange company to "market and sell" local and long distance service jointly after interLATA authority is granted. Such a reading, however, would render the other provisions of Section 272 meaningless. For the other provisions of Section 272 to have any meaning, Section 272(g)(2) must be read more narrowly. Given the context of the Act as a whole, Section 272(g)(2)

20/ 47 U.S.C. § 272(a)(1).

21/ See 47 U.S.C. § 272(b)(3), (5) (1996). Notice at para. 92.

permits, at most, that an RBOC can market and sell to customers local exchange service offered by the operating company and long distance service offered by the interLATA affiliate, on an unbundled basis. Each service offering would be priced under the separate company's respective tariff. This "side-by-side" provision of services to a single customer arguably would not violate the separation provisions so long as absolutely no joint operational or provisioning activity is required -- the local exchange carrier provides the local service and the interLATA affiliate provides the long distance service. The BOC's price of local service to the consumer is the same whether the consumer takes long distance service from the interLATA affiliate or from another interLATA provider. Similarly, the affiliate's price for long distance service is the same regardless of the identity of the local service provider.

Thus, for example, "market and sell" does not include providing bundled discounts for the purchase of both services. 22/ This narrow reading gives meaning to Section 272(g)(2) and also is consistent with the BOC's obligation to allow other unaffiliated carriers to sell its local exchange service on the same terms and conditions as its interLATA affiliate. 23/ This arrangement also ensures that the RBOC will price and provision necessary inputs on a cost-based, nondiscriminatory basis, and that the relationship between the operating company and interLATA affiliate is independent in every sense that Congress contemplated.

22/ Notice at para. 91.

23/ 47 U.S.C. § 272(g)(1).

This interpretation of Section 272(g)(2) is supported by the Joint Explanatory Statement accompanying the Act. There Congress states that once an RBOC is authorized to provide interLATA services, the operating company may sell its exchange services "in conjunction with the interLATA service being offered by the separate affiliate in that state required by this section." 24/ In other words, side-by-side marketing may be permissible; but the operating company cannot engage in any action that constitutes "offering" interLATA service itself.

In sum, the Commission should permit an RBOC to provide packages of local and long distance service only through an affiliate that obtains the local exchange components on the same terms and conditions that its interLATA competitors do: using inputs from the operating company, obtained on an arm's length basis. The requirement that interLATA services be provided only through a separate affiliate would be defeated if the local exchange company -- the operating company -- could provide its local exchange and intraLATA services "jointly" with the affiliate on a bundled basis.

IV. THE ACT PROHIBITS AN RBOC FROM MOVING ITS LOCAL NETWORK OPERATIONS INTO THE INTERLATA AFFILIATE.

Notice at paras. 70-71, 79 [Sections V.B, V.C.].

The FCC tentatively concluded that an RBOC may not evade its obligations under Section 272 simply by transferring its local exchange network capability to another affiliate (including its interLATA affiliate). 25/ We agree.

24/ Joint Explanatory Statement of the Committee of Conference, at 36.

25/ Notice at paras. 70, 79.